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## Parliamentary imm(p)unity

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### Abstract

The parliamentary immunity as an ensemble of legal provisions, ensures for the deputies and the senators a derogatory juridical system from the common law, in relation to the justice and with the purpose of guaranteeing their independence. The protection that is being offered to the members of the Parliament against potential abuses from the executive power is a relative, not an absolute one. Thus, immunity does not imply impunity. In accordance with the principles of a democratic state, it is necessary that an adequate protection is offered to the deputies and senators, precisely so that a situation would not arise, in which they are prevented from exercising their mandate according to their own convictions, as a consequence of political disputes or personal vendettas.

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### 1. Introductory Elements

Due to the current social background, in which the influences of the political aspects are more and more visible in all fields of activity, we consider it useful to analyze in minute detail the organ of immunity, bearing in mind the fact that in this respect there are two opposite general opinions. On one hand, there are voices that claim the removal of this protection conferred to the parliamentarians, supporting the fact that this privilege is unjustified, and on the other

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hand, there are opinions which claim the consolidation of the warranties offered to the political representatives, in order to avoid the situation in which a deputy or a senator can not perform his mandate because of abuses of any kind.

The specialized literature (Deleanu, 2006, p. 69) states that according to new European democracies, the state subject to the rule of law is a necessary, useful and mythical reason who supported the idea of the human rights and freedoms as being the most powerful in the state. Among these rights there is the right of every citizen to choose, this being a proof of the statehood of the peoples.

Naming a representative means in fact agreeing on a convention between the ones who choose and the ones who wish to obtain the status of parliamentarian, this power being conferred in order for the latter to represent the rights and interests of the private parties, and to have their voice heard at the hierarchic level.

Given these conditions, the confidence vote with which the people's representatives are endowed, bears a few obligations on their behalf, which are established by means of fundamental law. In order to have a justified balance in performing the mandate and to not interfere in an abusive manner, the procurator obtains a special status which confers to him some types of warranties. One of these warranties is called parliamentary immunity, which consists of an ensemble of legal provisions, that ensures for the deputies and the senators a derogatory juridical system from the common law, in relation to the justice and with the purpose of guaranteeing their independence.

This institution, as per the specialized literature (Iancu, 2007, p. 489), "aims at protecting the parliamentarian from abusive or tormenting judicial follow-ups, and not at removing the parliamentarian's responsibility. There are two categories of parliamentary immunities: the inexistence of responsibility (irresponsibility), which concerns the legal activity of performing the mandate of the parliamentarian (discourses, opinions, votes) and the inviolability, which comprises special rules with regards to the perquisition and arresting of the senators or deputies.

The localization of the rules in case of these types of immunities is to be found in art. 72 of the Romanian Constitution: "The deputies and senators cannot be made responsible for the votes or political opinions expressed while performing the mandate. The deputies and senators can be subjected to follow-ups and trials for deeds that don't have any connection to votes or political opinions expressed while performing the mandate, but can not be searched or arrested without the prior agreement with the Chamber to which they are submitted after intercepting them. The follow-up and trial can be performed only by the Prosecutor's Office attached to the High Court of Cassation and Justice. The competence of arguing belongs to the High Court of Cassation and Justice."

In this respect we notice that the protection conferred to the members of the Parliament against abusive uses of power is relative and not absolute, because the immunity doesn't also include impunity.

Analyzing both forms of parliamentary immunity, we notice that the notion of irresponsibility was defined by the specialized literature (Danisor, 2007, p. 353) as being an essential rule of the representative democratic regime, which brings into discussion the fact that the senators and deputies cannot be brought to book for votes or political opinions expressed while performing the mandate.

Being a constitutional institution, the irresponsibility is maintained even after the mandate is over, its reason for existing being the interest of the wellbeing of the Parliament and not the personal interest of the chosen candidate, as a person.

As opposed to irresponsibility, inviolability - the second form of immunity is included in art. 72 of the Constitution and maintains that the senators and deputies be followed-up for deeds that don't have any connection to votes or political opinions expressed while performing the mandate, but can not be searched or arrested without the prior agreement with the Chamber to which they are submitted after intercepting them. This is a so-called formal immunity, as per specialized literature claims (Gilia, 2009, p. 170, Turianu, 2012, p. 1) and it is connected exclusively to criminal responsibility. It protects the mandate and the parliamentarian against the prospects of repressive or abusive follow-ups, inspired by presumed political reasons or personal vendetta, pressures, plots for actions outside the mandate.

We notice that the inviolability has as main purpose the protection of the parliamentarian in what concerns his actions with regards to deeds that do not have any connection to the direct performance of the mandate.

We adhere to the opinion (Muraru and Tanasescu, 2006, p. 190) according to which the parliamentary immunity is some sort of juridical warranty for the undisturbed performance of the activities of senators and deputies. It must not be interpreted as the removal of responsibilities of senators and deputies for not obeying to the laws, but as a protection against possible abuses or pressures, this protection being so necessary from the point of view of a

democratic system.

As opposed to other forms of immunities, we notice that the inviolability refers to a set of warranties which confer stability and security during the performed mandate.

## **2. Arguments with Regards to the Removal of Protection Conferred to Parliamentarians**

Even though we reckon that restraining immunities would be a step forward against corruption, removing this form of protection doesn't but submit the legislative representatives to the executive power, making them more vulnerable to some abuses.

We support the fact that the institution of parliamentary immunity is perceived erroneously by the public opinion, because the tendency is to eliminate this institution as a whole. The specialized literature (Turianu, 2012, p. 1) claims that there is a visible discrepancy between the theoretical concept of "parliamentary immunity" and the actual way in which this institution is applied in practice.

Generally speaking, the tendency to restrain the protection to which the representatives of the Parliament are submitted was considered to be in response to the widely spread concept according to which the parliamentary immunities are nothing more than unjustified privileges which are awarded to the elected ones, and even a way of eliminating the law.

The Presidential Commission for the Analysis of the Political Regime and Constitutional Regime of Romania, in the activity report required by the President of Romania (The Presidential Commission for the Analysis of the Political Regime and Constitutional Regime of Romania, pp. 24-25) argued that : "The Parliamentarians view the parliamentary immunity as a check in blank, designed to offer the premises of the birth of a cast of citizens who don't benefit from a position of impunity and intangibility. The natural protection from the executive powers is converted to the argument that justifies the appearance of criminal and procedural privileges".

In this respect, the specialized literature (Popescu, 2011, p. 23) states that the individual political responsibility was adsorbed by the criminal responsibility of the elected, which in its turn was proved to be inefficient, because of the parliamentary immunity. Consequently, in most of the European states, in order to gross the political legitimacy of the representatives and improve their responsibility, the institution of parliamentary immunity was restricted more and more towards the lack of juridical responsibility for the political opinions expressed during the political mandate and towards ensuring procedural warranties in case of criminal deeds during the political mandate.

The Jurisprudence (Bucharest Court, 2013, p. 24) states that "the criminal investigation Institution was prohibited from performing a plenary analysis, when the decision of not leaving the country was taken, as per art. 136 CPC, because of the invalidity of the procedural conditions with regards to the parliamentary immunity. However, from this perspective, this seems to be as an inequitable juridical treatment, by means of the measures taken between the CM-V and TAS accused and defending parties, under the conditions in which, given these reasons, the measure of preventive detention couldn't be taken into account, all the more so when, as shown by the following – releasing the accused means quite a factual danger for the public order as compared to the arresting of the defendant".

In this respect we formulate a contrary opinion, considering that the immunity should be regarded not as impunity but as a way to perform the mandate.

## **3. Opinions with Regards to the Necessity of Protection in Case of Parliamentary Mandate**

The members of the representing central authorities (senators, deputies and the head of the State) benefit from immunity, having a special juridical status, with regards to following and indicting, in order to mainly protect themselves from possible upcoming baffles with regards to alienate them from their main mission of performing their function (Deaconu, 2007, pp. 160-161), restricting the constitutional provisions in this matter leading to this principle's lack of actual meaning.

Due to the fact that the members of the Parliament are exposed by means of their functions, to certain attacks in the political field, and can also be victims of juridical errors, it is imposed that they benefit from additional warranties in what concerns the way in which the criminal investigation actions are performed.

This point of view is maintained also in the specialized literature, under the conditions in which the parliamentary immunity doesn't suppress the criminal repression, but only postpones the moment of sending to trial, of criminal follow-up or of criminal investigation. In other words, this is not considered to be a reason to exonerate

responsibility, and suppressing the juridical immunity is firmly opposed to the parliamentary democracy's principles.

Thus, according to some authors (Vrabie, 1999, p. 92, Turianu, 2012, p. 1, Gilia, 2009, p. 171) the inviolability doesn't imply immunity because the criminal responsibility is not suppressed, but the moment in which the criminal investigation starts is only postponed, being considered a temporary action. The legislative power's representative is thus protected in the opinions and votes expressed during his mandate guaranteed by the electors, but he is responsible as is any other citizen for the crimes which don't have any connection with this mandate, the only accommodations accepted being procedural ones.

We highlight the fact that the parliamentarian, as physical entity is not out of the scope of criminal legislations. We can state that the effects of immunity regard the persons that invested the parliamentarians with this function, as the people has to be certain that the elected one will represent their interests without restraints on behalf of the political competitors.

Thus, one of the measures to protect people's representatives is the prohibition of detention, arrest or search of a deputy or senator, without prior consent of the Chamber that he is part of, the main reason for establishing this guarantee being the protection of parliamentarians' against any kind of proceedings initiated against him biasedly and abusively.

However, the Constitution assigns the Prosecutor's Office, attached to the High Court of Cassation and Justice, jurisdiction regarding criminal investigation and prosecution of a parliamentarian, and in the event that he shall be prosecuted, the High Court of Cassation and Justice has jurisdiction to judge the case, given the fact that it's impartiality is at the highest level, presenting the ultimate guarantees of independence.

It should be noted, however, that when the jurisdiction of the High Court of Cassation and Justice has been determined by the personal status of the defendant, a Senator or Deputy, and he has ceased to hold the office, and also the committed offense is unrelated to professional duties as a parliamentarian, High Court of Cassation and Justice has no jurisdiction to hear the case in the first instance.

Furthermore the establishment of a jurisdiction based on personal status for legislators' is a potentially beneficial measure because member of the parliament are removed from the jurisdiction of the Court which would have jurisdiction according to the general rules, by sheltering them against judge's impartiality that could be impaired by relevant circumstances of the case, the personal status of the parties or any potential local adversities.

In light of these considerations, we consider that eliminating or restricting the guarantees granted by immunity encourages political pressures and fabrications. In this context, there is the risk that elected representatives may not be able to exercise their mandate in accordance with their political beliefs or declared agenda. Therefore, this situation can be seen only as a transgression of the basic principles of democracy and constitutional state.

Without an adequate political protection, the way for abuses such representatives would be opened, with the consequence of the inability to effectively mandate. We appreciate that if such practices can not be encouraged, the sole purpose of the parliamentary immunity is that of preventing and deterring prosecution without legal grounds.

Also, any politician would be able to eliminate a competing candidate by elaborating unjustified criminal complaints or by framing him, and given the very long duration of criminal cases, this may even entails removing the opponent from the political scene. However, given the media coverage of cases involving politicians, it could irrecoverably damage the image of a person against whom a criminal complaint was filed. Despite any presumption of innocence, in the public opinion, political representatives may remain with the stigma of a "prosecuted man", even if the solution subsequently disposed by the investigators reveals his innocence.

#### **4. Aspects related to the procedure of lifting parliamentary immunity**

Constitutional provisions are consistent with the Statute of Deputies and Senators and those of the Chamber of Deputies, which provides detailed procedure for the waiver of parliamentary immunity in Articles 171-172, respectively 191-195.

Parliamentary immunity is a legal guarantee to Deputies and Senators for the unhindered exercise of their mandate. Thus, it should not be construed as removing legal liability for violations of the laws committed by a member of the parliament, but as a protection against possible abuse or pressure.

As regards the approval of the Chamber, stipulated in art. 72, Para. 2 of the Constitution, it is easily noticeable its exclusive political character. The debates in the Chamber about the approval of the application for detention, arrest

or search are not jurisdictional, the High Court of Cassation and Justice is the court that has full jurisdiction, being the only one that could determine the guilt or the innocence of parliamentarians (Ionescu, 2004, p 458).

In case is sought initiation of criminal proceedings against a member of the executive power, but which is also a member of the parliament, the Chamber is expected to endorse the request for the initiation of prosecutions filed by the Minister of Justice. If the subject of criminal investigations is the Minister of Justice himself, in this case the request shall be made by the Prime Minister.

This procedure for approval of the request by the Chamber of Deputies or the Senate shall be preceded by a report drawn by the permanent commission or a special committee of inquiry set up for this sole purpose, report that will have high priority on the Chamber's debates agenda, activity that shall be done mandatory in the presence of the concerned parliamentarian. If he shall be indicted, he can, afterwards be searched, detained or arrested only with the consent of the Chamber, after prior hearing.

In the report of the Presidential Commission for the Analysis of political and constitutional regime in Romania - to strengthen the constitutional state, it is alleged that the conversion of Assembly in a grand jury is wrongful, given that they can assess through special committees the case evidences. In this manner, legislators have the ability to convert a tool of protection into a weapon that blocks, arbitrarily, the path of justice in some cases. Mandate protection may not mean the enshrining of a formal inequality between citizens.

Compared to these assertions, specialized literature opines otherwise (Gilia, 2009, page171). Commission that assesses the evidence is a specialized committee - Legal, Discipline and Immunities Committee - which consists usually of lawyers, therefore people who are trained to express an opinion and argue pertinently about any evidence submitted. Given that there were cases of waiver of parliamentary immunity, the allegation that immunity is a weapon blocking the path of justice is invalidated.

The presumption of innocence is the ultimate guarantee for the equity of the act of justice and it should operate in favor of a member in the Parliament as it should function for every citizen. The protection conferred by the institution of parliamentary immunity, however, is inherently connected to membership of Parliament, losing the office resulting in inherent loss of immunity.

## 5. Conclusions

Parliamentary immunity is therefore a constitutional institution, meant to protect the parliament against any repressive or arbitrary measures, which could be taken against them by the executive or the judicial power and thus undermining his independence.

Analyzing the relevant legislation and judicial practice, we opine to the effect that this institution does not eliminate the liability of members of the Parliament and does not represent an issue of impunity, but represents a guarantee conferring them the opportunity to exercise their mandate in a climate of independence, without being under pressure of other external interference. In such circumstances, we consider that inviolability cannot be regarded as a privilege, but a special procedure for the protection of parliamentarians against unfair acts or deeds, or against insufficiently founded allegations.

Given that criminal procedure is an activity that drags over time, aspect that may negatively influence the effective exercise of the legislative activity a member of the parliament carries on, we appreciate that certain legislative changes are absolutely necessary. To this end, we consider appropriate to establish normative provisions that conditions the initiation of criminal proceedings or the prosecution to the prior approval of the Chamber, a necessary measure not to be seen as a protection, but as a guarantee of accomplishment of the act of justice.

In support of our proposal, we emphasize that as regards the liability of ministers, Romanian legislator intended to establish the condition of obtaining an opinion from the Chambers before beginning any criminal proceedings. Compared to such provisions, we consider that members of Parliament are required to have a similar legal protection as a procedural guarantee, capable of preserving the public interest. Thus, through the establishment of the procedural rules, members of Parliament can be sheltered from any baffles that would reflect upon exercise of public functions with which they have been invested and thus, the act of lawmaking.

The role of parliament as an exponent of legislative power is, in addition to lawmaking to exert control over the executive, function that ensures the balance of powers.

For this reason, we think it is even more important that members of parliament should be provided with sufficient safeguards during their mandate. Therefore, imposition of protective measures would prevent abuses from

representatives of the Prosecutor's Office and the political interference in the judicial act, ensuring the full independence of Parliament and parliamentarians. One cannot appreciate that this would pursue to circumvent state laws or encourage irresponsibility, being obvious that members of parliament should be protected from such acts of unfair inquiry.

In this context, we share the view of the Constitutional Court (Constitutional Court, 2011), which argues that the removal of any of these forms of parliamentary immunity would result in directly suppression of any security measure regarding both the mandate of Houses and each parliamentarian, with serious impact on Parliament compliance to the extent of his constitutional role.

Also, the Constitutional Court ruled that for the ministers or former ministers that are also parliamentarians to be required the authorization of the Chamber, to which they belong, for the initiation of prosecution (Constitutional Court, 2008).

In addition, the European Court of Human Rights, in its case law, has ruled (ECHR, 2008) that parliamentary immunity is an institution that seeks a legitimate aim that of ensuring full independence of the parliamentarians and Parliament. Immunity has a character of public order, which requires that the judicial authorities are obliged to take it into account *ex officio* and any acts performed with its failure shall be automatically void.

The European Court also held that immunity of parliamentarians [...] [has] the purpose of enabling them to attend constructively to the parliamentary debates and to represent the voters in matters of public interest by expressing and arguing freely their opinions without the risk of being prosecuted by a court or other authority. It is also revealed that immunity aims to a second legitimate purpose which is ordering relationships between the legislative and judicial powers (ECHR, 1996).

Likewise, the European Court held that states granting immunity, more or less extensive, for the parliamentarians is a long-standing practice that aims to allow the free expression of the people's representatives and should prevent a biased prosecution that could prejudice the parliamentary office (ECHR, 2003).

Consequently, we consider as desirable the extension of legal protection within the meaning of seeking the approval of the Chamber not just in the case of eventual detention, arrest or search, but especially for situations in which prosecution might have criminal extent which can have a particularly strong impact on the activity of the investigated person. Prosecution engaged against a parliamentarian can affect the functioning of the Assembly and may even disrupt proper conduct of parliamentary proceedings.

Moreover, we appreciate that the presumption of innocence should be reflected in the judgment of the Chamber regarding the waiver of parliamentary immunity, which involves only taking measures to pursue search, detention or arrest by the competent authorities.

European legal framework reveals that the immunity is an important tool of the European Union, at a community level. Analysis of legislation regarding parliamentary immunity from different EU states emphasizes the urgent need to amend Romanian legislation for the purposes of widening the scope of parliamentary immunity - which represents a guardian of the independence of Deputies or Senators in exercise of their mandate - our suggestions being aligned with these prerogatives.

In accordance with the European provisions that focus on protecting the elected representatives, we consider that is absolutely necessary an intervention of the national legislator for the purpose of requiring the approval of the Chambers in both cases, either opening an investigation or prosecuting the parliamentarian.

In another perspective, we point out the fact that this protective measure is particularly important for the activity of parliament members, belonging to the opposition parties, which are often exposed to political harassment.

We note that in the situation of parliamentarians there is no particular protection in the event of prosecution, or biased and abusive investigation, as a result of framing. The lack of guarantees may result in denigration and discrediting the image of the person concerned, which implicitly could involve removing him from the political life.

Concluding, we emphasize that parliamentary immunity was designed as a defense of democratically elected representatives in the Parliament intended to protect their independence from external pressures and to guarantee freedom of expression and action in the process of carrying out their mandate.

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